

## **GUIDANCE FOR WASHINGTON PUBLIC EMPLOYERS FOLLOWING THE *JANUS* DECISION**

---

**The *Janus* Case:** As you are likely aware, on June 27, 2018, the United States Supreme Court issued a ruling in *Janus v. AFSCME* holding that it is unconstitutional for a public-sector employer to require non-consenting employees to pay agency fees or other payments to a union. The specific challenge in the *Janus* case was to employer deductions for “agency fees,” which are union charges to employees who decline to join the union, but who still benefit from its activities like collective bargaining and representation in the grievance process. The Court held that for a public employer to require employees to pay such fees to unions violates non-consenting employees’ free speech rights.

**What Does *Janus* Mean for Public Employers in Washington?** The Illinois law challenged in the *Janus* case required employers to automatically deduct agency fees from employee wages if the collective bargaining agreement contained an agency-fee provision, with no form of consent from the employees required. While Washington laws and individual collective bargaining agreements differ with respect to how they address deductions for union dues or fees, the federal courts are likely to find unconstitutional any deductions from the wages of public-sector employees for union fees or other payments where the employees do not want to be union members and have not affirmatively consented to the withholding of fees or other payments. One key question will be whether existing employee authorizations to deduct union dues or fees meet the Court’s standard for affirmative consent.

**In our view, which is consistent with what we have seen from other early commentators and even several unions, *Janus* requires public employers to cease making payroll deductions for agency fees immediately.** While employees may have signed forms authorizing the deductions of agency fees prior to the *Janus* decision, that consent would not have been freely given where an employee was required to sign as a condition of employment. In contrast, an employee who affirmatively elected to become a union member and authorized a payroll deduction for membership dues should continue to be viewed as having affirmatively consented to deductions.

We further believe that public-sector employers may no longer require employees to authorize deductions for fees or other payments by enforcing contract language that requires such payments as a condition of employment, as that may result in compelled payments from employees who do not want to be members of the union and support its activities. One challenge employers may face with respect to current employees is knowing whether any employees oppose supporting a union financially, as union

security clauses and/or internal union fee structures may not provide employers with such information. For example, in some cases agency fees are equivalent to the amount of union dues, so the employer does not know whether it is deducting union member dues or non-member agency fees.

**What to Do?** Public employers are undoubtedly eager to ensure they are not acting contrary to the *Janus* case, as that could subject them to legal challenges from employees. At the same time, employers need to be mindful of the potential for legal challenges from unions, should they take actions that the unions believe are not mandated by the *Janus* decision and are contrary to the terms of a collective bargaining agreement or Washington statutory requirements. Employers should first carefully evaluate their particular circumstances before taking action, in order to weigh potential litigation risks. We recommend the following initial steps:

- Analyze the applicable contract language and other evidence with respect to any wage deductions for payments to the union.
  - Does the CBA differentiate between union dues for members and non-member agency fees?
  - Do you know whether individual employees are paying union member dues or agency fees?
  - Does the CBA purport to require union membership as a condition of employment? If so, the parties will need to bargain new language, as employees cannot be compelled to be union members.
  - Does the CBA obligate the employer to enforce the terms of the union's authorization card, and if so, what does the card say (e.g., does it limit when employees may withdraw authorization for dues payments)?
- If you cannot identify which employees (if any) are paying agency fees and not membership dues, promptly request this information from the union. Advise the union that this information is needed to ensure compliance with *Janus*, that your intent is to cease deducting agency fees, and that you would like to meet with the union soon to work through any other impacts of the *Janus* decision.
- Provide notice to those employees who have been agency fee payors about the *Janus* decision explaining that: (1) you will immediately discontinue payroll deductions of agency fees unless you receive a new post-*Janus* authorization signed by each employee; and (2) you will not enforce any union security language contained in the CBA (i.e., that the employer will not enforce a CBA provision requiring it to terminate the employment of a bargaining union employee who declines to be a union member or pay agency fees). We recommend that you first share this notice with unions to get their input.

- Reach out to unions to understand what their policy will be if an employee wants to stop union membership. Some unions may only require written notice, while others plan to enforce restrictions on withdrawal. Ideally, public employers and unions can work collaboratively on a process to handle any employee union membership withdrawals and/or new consents for agency fee deductions.
- Work with the union to renegotiate any union security language in the contract that is inconsistent with the requirements of *Janus*.
- Ensure that supervisors and managers do not encourage employees to withdraw their union membership or attempt to advise bargaining unit members regarding the impact of *Janus*. Unions are likely to be very sensitive to interactions that may be perceived as interference, so employees with questions should be directed to their union or human resources.

**Getting Guidance:** Unfortunately, the path forward to comply with the *Janus* decision will differ for employers depending on the manner and extent to which its unions permit employees to opt-out of union dues and the specific terms of their CBAs. We strongly encourage you to get legal advice specific to your CBAs and union relationships. Please contact a Summit labor attorney by calling 206-676-7000 if you would like our help in addressing *Janus* issues.

The information contained in this document is for general educational purposes only and is not intended to be legal advice. Please consult legal counsel for advice about specific questions.